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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-73, 75-109

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, *Appellants in No. 75-73,*

JANE HUNERWADEL, for herself and all other similarly situated, *Appellant No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

BRIEF OF APPELLEES

ROY LUCAS
LUCAS & STOLTZ
Suite 250
Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006
Tel: (202) 338-6955
Attorneys for Appellees.

Of Counsel:
JOAN C. SCHMIDT
Suite 200
One Center Plaza
Boston, Massachusetts 02108

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INDEX

Page

STATEMENT OF THE CASE 1

A. Facts 1

B. Expert Testimony 7

C. Findings of the District Court 15

ARGUMENT:

I. The Double Parental Consent Provision of the Massachusetts Abortion Law, MASS. GEN. LAWS, c. 112, § 12P, Invades a Pregnant Minor Woman's Individual Fourteenth Amendment Right of Privacy by Permitting Either Parent, for any Reason or No Reason at all, to Veto Her Access to Necessary Medical Care, Regardless of Rape, Incest, Her Medical Needs, or Personal Maturity 17

A. The Statute 17

B. Decision of the District Court 21

C. Common Law and Statutory Sanction of Minors' Contracts for Necessities Including Medical Care 23

D. Decisions by This Court on the Fundamental Constitutional Rights of Minors ... 29

E. Application of *Roe* v. *Wade* and *Doe* v. *Bolton to This Case* 35

F. Lower Court Decisions on Parental Consent, Abortion, and Contraception 40

II. The Asserted State Justifications Are Not Narrowly Drawn to Advance Legitimate, Compelling Interests 41

III. The District Court Correctly Refused to Seek a State Court Ruling on the Meaning of Sec. 12P 47

Page

IV. The District Court, in Its Discretion, Correctly Determined That a Guardian *Ad Litem* Was Unnecessary to Protect the Interests of Mary Moe 50

V. Joinder of the Parents of Mary Moe as Defendants Was Unnecessary 54

A. The District Court Correctly Refused to Join the Parents of Mary Moe as Defendants Because Neither Had a Cognizable, Independent Interest in the Case 54

B. Mary Moe's Parents Were Adequately Represented in This Class Suit by Intervenor-Appellant 55

Conclusion 56

TABLE OF AUTHORITIES

Constitutional Provisions:

United States Constitution—

Amendment I .....*passim*
Amendment XIV .....*passim*

Statutes:

Massachusetts Statutes—

Mass. Gen. Laws, c. 112, § 12F 19
Mass. Gen. Laws, c. 112, § 12H 20, 21, 28, 46
Mass. Gen. Laws, c. 112, § 12N 19
Mass. Gen. Laws, c. 112, § 12P .....*passim*
Mass. Gen. Laws, c. 112, § 12Q 18
Mass. Gen. Laws, c. 112, § 12R 19
Mass. Gen. Laws, c. 119, § 61 21
Mass. Gen. Laws, c. 207, § 7 21
Mass. Gen. Laws, c. 207, § 9 21
Mass. Gen. Laws, c. 210, § 2 21
Mass. Gen. Laws, c. 265, § 23 21
Mass. Gen. Laws, c. 272, § 19 6
Mass. Gen. Laws, c. 274, § 2 6

Page

Other Statutes and Rules—

Calif. Civil Code § 34.5 28
Fed. R. Civ. P. 17(c) 51
Fed. R. Civ. P. 19(a) 54
Fed. R. Civ. P. 19(d) 55
Fed. R. Civ. P. 23(a) 55
Fed. R. Civ. P. 23(b)(2) 55
Ga. Code Ann. § 26-1201 38
28 U.S.C. § 1983 50

Cases:

Adoption of a Minor, *In re,* 120 F.2d 720 (D.C. Cir. 1941) 52
Baggett v. Bullitt, 377 U.S. 360 (1964) 48
Ballard v. Anderson, 4 Cal. 3d 873, 484 F.2d 1345, 95 Cal. Rptr. 1 (1971) 27, 28, 40
Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) 27
Bradford v. French, 110 Mass. 365 (1872) 25
Breed v. Jones, 421 U.S. 519 (1975) 34
Brown v. Board of Education, 347 U.S. 483 (1954) 33
Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972) 27
Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974) 55
Cleveland Bd. of Education v. LaFleur 42
Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974) (three-judge court), *aff'd after remand sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir.), *appeal docketed,* 44 U.S.L.W. 3319 (U.S. Nov. 14, 1975) (No. 75-713) 40, 42, 45
Commonwealth v. Hare, — Mass. —, 280 N.E. 2d 138 (1972) 6
Commonwealth v. Schaflander, — Mass. —, 279 N.E.2d 670 (1972) 6
Dale v. Copping, 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610) 24, 25, 35
Dellamano v. Francis, 308 Mass. 502, 33 N.E. 2d 327 (1941) 26
Doe v. Bolton, 410 U.S. 179 (1973) .....*passim*
Doe v. Exon, — F. Supp. —, Civ. No. CV 75-L—146 (D. Neb. October 8, 1975) (three-judge court) 40

Page

Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (three-judge court) 40
Doremus v. Board of Education, 342 U.S. 429 (1952).. 30
Dow v. Lipsitz, 283 Mass. 132 (1933) 26
Eisenstadt v. Baird, 405 U.S. 438 (1972) .....*passim*
Engel v. Vitale, 370 U.S. 421 (1962) 30, 33
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 48
Epperson v. Arkansas, 393 U.S. 97 (1968) 6
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 6, 32, 33
Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975) 40, 51, 52
Fornais v. Ridge Tool Co., 400 U.S. 41 (1970) 49
Gary-Northwest Indiana Women's Services v. Bowen, — F. Supp —, Civ. No. H-74-289 (N.D. Ind. January 3, 1975) (three-judge court) 40
Gallegos v. Colorado, 370 U.S. 49 (1962) 34
Gault, *In re*, 387 U.S. 1 (1967) .....*passim*
Ginsberg v. New York, 390 U.S. 629 (1968) .....*passim*
Griswold v. Connecticut, 381 U.S. 479 (1965) 8, 32
Haley v. Ohio, 332 U.S. 596 (1948) 34
Harman v. Forssenius, 380 U.S. 528 (1965) 48
Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 48
Harrison v. N.A.A.C.P., 360 U.S. 167 (1959) 48
Hugins v. Wiseman, Carth. 110, 90 Eng. Rep. 669 (K.B. 1690) 24, 25
International Union of Operating Engineers, Local 103, AFL-CIO v. Imscher & Sons, Inc., 63 F.R.D. 394 (N.D. 1973) 55
Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *vacated on other grounds,* 420 U.S. 128 (1975) 51, 52
Jackson v. Guste, — F. Supp. —, Civ. No. 74-2425, Sec. F. (E.D. La., January 26, 1976) (three-judge court) 40
Kent v. United States, 383 U.S. 541 (1966) 34
Kusper v. Pontikes, 414 U.S. 51 (1973) 49
Lake Carriers' Association v. MacMullan, 406 U.S. 498 (1972) 48
Lehman Brothers v. Schein, 416 U.S. 396 (1974) 48
Levy v. Louisiana, 391 U.S. 68 (1968) 33

Page

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 34
Meyer v. Nebraska, 262 U.S. 390 (1923) 31, 33
Noe v. True, 507 F.2d 9 (6th Cir. 1974) 53
Oakey v. Jackson, [1914] 1 K.B. 216 26
Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted pending appeal,* 420 U.S. 918, *prob. juris. noted,* — U.S. —(1975) (Nos. 74-1151 & 74-1419) 40, 41
Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) (three-judge court), *appeal docketed sub. nom.* Beal v. Franklin, 44 U.S.L.W. 3306 (U.S. Nov. 13, 1975) (No. 75-709) 40
Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'ing after remand,* Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974), *appeal docketed,* 44 U.S.L.W. 3319 (U.S. Nov. 13, 1975) (No. 75-713) 40, 42, 45
Prince v. Massachusetts, 321 U.S. 128 (1944) .....*passim*
R. v. Downs, [1875] 1 Q.B. 25 26
R. Senior, [1899] 1 Q.B. 283 26
Railroad Com. v. Pullman Co., 312 U.S. 496 (1941) 48
Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956) 26
Roberts v. Ohio Casualty Insurance Co., 256 F.2d 35 (5th Cir. 1958) 51, 53
Roe v. Wade, 410 U.S. 113 (1973) .....*passim*
Roth v. United States, 354 U.S. 476 (1957) 32
Rotzenburg v. Neenah Joint School District, 62 F.R.D. 340 (E.D. Wis. 1974) 52
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Smith, *In Re*, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972) 45, 46
State v. Koome, 84 Wash.2d 901, 530 P.2d 260 (1975) 40
Stone v. Dennison, 30 Mass. (13 Pick.) 1, 6 (1832) .. 26
Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) 55
Swift v. Bennett, 64 Mass. (10 Cush.) 436 (1852) 26

Page

Till v. Hartford Accident and Indemnity Co., 124 F.2d 405 (10th Cir. 1941) 52
Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 30, 31, 33
Trainer v. Trumbell, 141 Mass. 527 (1886) 25
Travelers Indemnity Co. v. Bengtston, 231 F.2d 263 (5th Cir. 1956) 51
Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891) .. 32
United States v. Noble, 269 F. Supp. 814 (E.D. N.Y. 1967) 52
Vlandis v. Kline, 412 U.S. 441 (1973) 42
Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974) 55
Westcott v. United States Fidelity and Guaranty Co., 158 F.2d 20 (4th Cir. 1946) 51
Wiley v. Fuller, 310 Mass. 597, 39 N.E. 2d 418 (1942) 26
Winship, *In re*, 397 U.S. 358 (1970) 34
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 48, 49
Wisconsin v. Yoder, 406 U.S. 205 (1972) 31, 41
Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974) (three-judge court) 40
Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) 40
Zwickler v. Koota, 389 U.S. 241 (1967) 49

OTHER AUTHORITIES:

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Page

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Minor's Right to Abortion and the Requirement of Parental Consent, Note, 60 Va. L. Rev. 305 (Feb. 1974) 47
Model Penal Code art. 207, § 207.11 36
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3A Moore, Federal Practice (1974) 55
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Right of Husband or a Minor's Parent to Participate in the Abortion Decision, Note, 28 U. Miami L. Rev. 251 (Fall 1973) 47
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JANE HUNERWADEL, for herself and all other similarly situated, *Appellant No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

BRIEF OF APPELLEES

Appellees respectfully submit this brief in support of the decision of the three-judge district court, and ask that the judgment below be affirmed.

STATEMENT OF THE CASE

The statement by Appellees should be supplemented as follows:

A. Facts:

Mary Moe testified *in camera* before the three-judge federal court. At that time she was age sixteen and

lived at home with her parents and three other siblings. (Tr., 131, Dec. 31, 1974).[1] She was in the tenth grade (Tr. 145).

When Mary Moe first thought she was pregnant, she sought a pregnancy test at a health clinic in her home town. She had to wait 43 days, however, before such a test would be definitive. During that time, she considered the alternatives to an abortion such as continued pregnancy and/or adoption. (Tr. 133). She discussed these options with two of her girlfriends and her older sister. (Tr. 141).

Mary Moe made a carefully reasoned, sensitive decision not to inform her parents of the pregnancy and her planned abortion. As the District Court stated:

> "Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. . . . Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." *Baird* v. *Bellotti,* 393 F. Supp. at 850.

Mary Moe showed particular and respectful concern for her mother and father. She testified that her mother "would get very upset. . ." (Tr. 134), and "might have a breakdown. . . ." (Tr. 136). She also commendably "wanted to finish school," (Tr. 135) and did not want to be "kick[ed] out of the house. . . ."

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[1] All references to testimony by Mary Moe are to the impounded second transcript volume dated December 31, 1974, which is on file with the Court.

(Tr. 135). While she could have legally remained in attendance at high school, she understandably chose to avoid the well recognized "additional difficulties and continuing stigma of unwed motherhood. . ." *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). Appellants produced no evidence that attending school while pregnant and unmarried could be beneficial to a sixteen year old young woman.

Appellants have not questioned the reasoning or sensitivity of Mary Moe in deciding to protect her parents from the knowledge of her pregnancy and abortion. Nor have Appellants suggested in any way that parental involvement might have added to the quality of her decision or her medical care. It was Mary Moe, not the State, who showed positive concern for harmonious preservation of the family unit. The District Court found that

> "she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort. . . . [*S*]*he was competent to make and effectuate that decision. . . . [S]he is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents.*" 393 F. Supp. at 850 (Emphasized supplied).

The women's health clinic provided Mary Moe with "different names of different places you could go. . . . [I]t was up to [her] to choose. . . ." (Tr. 136). They also gave her educational material on different methods of birth control and abortion. (Tr. 136). She had only $20 and borrowed $5 more from her sister. (Tr. 140). The health clinic listings of abortion centers gave

Parents Aid Society as "the only place that listed anything about financial trouble." (Tr. 140).

Parents Aid and Dr. Zupnick accepted Mary Moe as a patient for the $25 fee, reduced from the usual $150.[2] (A. 221).[3]

In addition to the informational material provided Mary Moe, she received about two hours of professional counseling at Parents Aid Society from a trained registered nurse, Marilyn Morrissey. (Tr. 140). This included a discussion of the abortion procedure, birth control, breast cancer, and related topics. (Tr. 141; A. 264). There was ample opportunity to ask questions. (Tr. 141). Previously, Mary Moe had received no sex education at school or in her home and had been unable to obtain contraceptives because she was under age 18. (Tr. 132, 146).

When Mary Moe first telephoned Ms. Morrissey, she was encouraged to tell her parents of the pregnancy if possible. (Tr. 143: "[I]f you can tell them, you probably should. . . ."). She chose not to do so for the reasons stated.

In view of the rapidly approaching effective date of the statute (November 1, 1974), Parents Aid Society and Dr. Zupnick scheduled Mary Moe for her abortion on the evening of October 31, 1974, rather than the following week as she had requested. (Tr. 138).

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[2] The regular practice of accepting patients for such sharply reduced fees, and Mary Moe for $25, is consistent with the non-profit structure of Parents Aid Society, Inc. Fifteen percent (15%) of the patients pay no fee. (A. 222). 393 F. Supp. at 851.

[3] "A" references are to the Joint Appendix on file with the Court.

Mary Moe had heard about the statute from a girlfriend and volunteered to be a plaintiff. (Tr. 138). She offered to "do" an affidavit. (Tr. 148). Her sworn statement was presented to the single district judge in support of the motion for a temporary restraining order. (*Id.*).

As scheduled, and after the order was granted, Mary Moe obtained her abortion. There were no complications. (Tr. 142). She had no bad dreams or depression following the procedure. (Tr. 167).

A child psychiatrist retained by Intervenors observed the *in camera* questioning of Mary Moe before the three-judge court. (Tr. 131). Significantly, he offered no testimony questioning her capacity to consent and to understand her actions. (A. 331-359). The District Court fully credited her testimony. 393 F. Supp. at 850 & nn.4-5.

The other plaintiffs also testified extensively and were supported by prominent expert witnesses.

William Baird, who earlier before this Court successfully challenged the Massachusetts birth control laws, see *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), is the director of Parents Aid Society, Inc. Baird claims standing because of the threat of prosecution as an aider, abettor, or accessory before the fact.

As the District Court noted, Baird "had been arrested without warning in connection with the Massachusetts birth control statute, so-called. . . . [He] had every reason to believe that they had only two alternatives—to continue their current activities and face immediate arrest, or to bring the present suit." 393 F. Supp. at 852. Previously, Massachusetts authorities went so far as to arrest an Ohio clergyman for merely

referring a woman to Massachusetts for an abortion.[4] Baird is much more overtly involved in pre-abortion counseling as director of an abortion center. His standing to sue is clear.[5] The probability of Baird's having been prosecuted for continuing his counseling activities is far greater than that expected by an out-of-state clergyman passing out telephone numbers to pregnant women. He has as much standing as Mary Moe or Dr. Zupnick, the co-appellees, or the theater manager in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 n.16 (1975). The District Court found it unnecessary to resolve the dispute over Baird's standing. 393 F. Supp. at 851. Baird is a proper party in this appeal and views the issue as highly important to counselors, nurses, and auxiliary health personnel in view of the *Hare* and *Schflander* prosecutions. In light of his independent status as an Appellee he asks this Court for a definitive ruling.

Dr. Gerald Zupnick, principal operating physician at the Parents Aid Society Boston abortion center, testified to his practice and experience with first trimester abortions, and with minor patients.

It was uncontradicted that other abortion centers referred patients to Parents Aid Society, particularly "minors who do not have parental consent or patients

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[4] Commonwealth v. Hare, —— Mass. ——, 280 N.E.2d 138 (1972). A second clergyman was prosecuted on similar facts in *Commonwealth* v. *Schaflander,* —— Mass. ——, 279 N.E.2d 670 (1972). The accessory before the fact statutes are MASS. GEN. LAWS c. 272, § 19, & c. 274, § 2.

[5] The discussion in *Eisenstadt* v. *Baird* further supports this conclusion. 405 U.S. at 443-446. *Accord,* Doe v. Bolton, 410 U.S. 179, 188 (1973) (physician standing); Epperson v. Arkansas, 393 U.S. 97 (1968).

who do not have the usual fee. . . ." (A. 211). About 15% of the patients are treated free of charge. (A. 222).

Dr. Zupnick had not encountered any minors incapable of giving an informed consent. (A. 213). He thought this to be possible only in case of "mental retardation." (A. *Id.*). About 30% of the patients at Parents Aid are minors, and about one-half of those preferred not to inform their parents. (A. 228).

The bulk of Dr. Zupnick's testimony consisted of an explanation of what transpires during the four or five hours a patient is at the abortion center. He explained that

> "[m]ost often [the patient's reaction] is relief at the completion of the procedure and surprise as to the simplicity. . . ." (A. 216).

This was explained in part by the fact that "most younger patients do not have the usual stigmata of illegal abortion in their heads." (A. 218). Reactive guilt or hostility were "rare." (A. 216).

There was a 75% follow-up of patients by one of "several cooperating physicians" in the Boston area. (A. 217).

Appellants, as advocates, have attempted to portray the Parents Aid abortion center as an assembly line impersonal operation. The Record is to the contrary.

B. Expert Testimony:

In this case the District Court had the benefit of extensive expert testimony from several nationally prominent individuals. On some issues the three-judge court made findings; on others, for the purposes of

argument alone, defense contentions were accepted, because, "either way, our ultimate conclusions would be the same." 393 F. Supp. at 853.

It is Appellees' position, that while only minimally necessary, the constitutional facts of this case are open to scrutiny and review by this Court. This has been the practice in First Amendment cases. The Court has accorded privacy rights equal or greater stature. *See Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965).

As to Defendants' and Intervenors' experts, Dr. Jules Rivkind "[had] not performed abortions under any circumstances." (A. 322). He was the sole gynecological expert called by Appellants. The hospital at which he was chairman permitted no abortions, no sterilizations, and no use of birth control pills, except "for the control of gynecological problems." (A. 318). He had conducted no research and written no articles on abortion or adolescent pregnancy. (A. 320).

Dr. Rivkind admitted that "90% of the first trimester abortions in this country are performed outside of hospitals. . ." (A. 327), but still insisted that the procedure was unsafe.

In view of his admitted bias and limited background, Dr. Rivkind was unqualified to offer competent testimony concerning minors' access to elective abortion. He opposed such access categorically, did not support the policy on abortion of the American College of Obstetricians and Gynecologists, and was opposed to the position taken in *Roe* v. *Wade,* 410 U.S. 113 (1973).

Dr. Rivkind did not require parental consent for minors seeking treatment of V.D., because Pennsylvania state law did not require such consent. (A. 321).

Presumably he would follow a law or decision waiving parental consent in the abortion area also.

Defendants and Intervenors also called a child psychiatrist, Dr. Raymond Yerkes. He had conducted no studies and written no articles on the subject of adolescent pregnancy. (A. 345-346). Dr. Yerkes had dealt with only about 30 pregnant patients under age 18 in the last twelve years. (A. 345).

He thought that minors under age 18 could give an informed consent to V.D. treatment. (A. 347). Dr. Yerkes admitted that "some" unmarried minors when pregnant could rise to the responsibility of making their own life decisions. (*Id.*). Significantly, Dr. Yerkes admitted that 17 year olds who chose not to abort would need more professional support than those who obtained abortions. (A. 350). He agreed that "emotional support can be provided for a pregnant minor without requiring parental consent." (A. 352). He further admitted that the desirability of abortion for a minor "depends upon the individual circumstances of the patient and the family and the particular situation in life." (A. 355). Finally, Dr Yerkes acknowledged that

> "there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. . . . [I]n this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role." (A. 357).

In sum, the testimony for Appellees does not detract from but in fact supports Appellants. All parties admit that emotionally supportive parental involvement

should be encouraged if at all possible. It is destructive, however, to the family unit for the State to *compel* such involvement over the objection of physician and patient in every case. That is the objectionable quality of the statute in question. "[O]ne's experiences [and] one's exposure to the raw edges of human existence"[6] compel recognition of the fact that mniors and the family unit need protection from the disruption which might erupt from applying this statute.

Plaintiffs' experts had far more in-depth experience in the underlying matrix of facts and behavior pertinent to this case.

Dr. Somers H. Sturgis, professor emeritus in gynecology at Harvard Medical School was the gynecological consultant to the first Adolescent Clinic in the United States. (A. 49). He is "closely allied to a clinic in the neighborhood of Boston where legal abortions are done. . . ." (A. 57-58). About 10% of their patients are under 18. (A. 58).

Dr. Sturgis testified that:

> "[A]ge is no criterion of development and maturity. . . . [E]ach individual must be judged by the doctor . . . most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help." (A. 57).

He stressed that unwanted pregnancy is a "social and emotional tragedy to an adult," but "even worse" and a "much more serious predicament" for a minor. (A. 52).

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[6] Roe v. Wade, 410 U.S. 113, 116 (1973).

Dr. Sturgis saw no medical reasons for denying abortions to persons under age 18.[7] He stated:

> "[A]t 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment." (A. 60).

As to the minor patients' phychological reaction to an abortion, Dr. Sturgis stated: "[I]n the vast majority of cases the young people are tremendously relieved." (A. 62).

Dr. Jane E. Hodgson, associate professor at the University of Minnesota, a Mayo Clinic graduate, and the author of numerous leading studies on first trimester abortion, testified next. Dr. Hodgson supervised over 25,000 such abortions as Medical Director of Pre-Term in Washington, D.C. About 11% of those patients were under age 18.

Dr. Hodgson explained that minors have a greater need for abortions than adults because with term pregnancy "the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternal mortality is much higher. . . ." (A. 75). She pointed out that "[t]eenage pregnancy is very disruptive in the family." (*Id.*)

As to the ability to understand the abortion procedure and given an informed consent, Dr. Hodgson observed:

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[7] Indeed, he stated: "[T]he younger the child the higher the risk with an unwanted pregnancy." (A. 16).

> "I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally sub-normal individual." (A. 77)

She had found that "some 12-year olds will be more mature than 18-year olds." (A. 79). She had seen a 13-year old patient capable of giving an informed consent and a 19-year old who lacked such understanding and capacity. (A. 80).

Dr. Hodgson illustrated some of the types of situations in which parents should not be told of a teenage daughter's pregnancy:

> "Illness on the part of the parents . . . where patients are concerned over their father's coronory status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord." (A. 82).

She answered the charge of physician conflict of financial interest by pointing out that fees for prenatal care and delivery are usually higher than those for abortion. (A. 86).

The third Plaintiff expert was Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School. She had extensive experience for "several years" "evaluating pregnant teenagers." (A. 87).

Dr. Nadelson emphasized that a requirement of parental consent delays an abortion procedure and that this is hazardous to the patient, both medically and psychiatrically. (A. 88-89). She observed that parents of pregnant teenagers "often feel guilty and angry. They may feel punitive towards the child. . . ." (A. 90).

Most minors she evaluated who had abortions "felt relieved by it. They feel that they have done the right

thing and have a second chance often." (A. 90). Less than 1% have clinically significant guilt or experience regret. (*Id.*).

Dr. Nadelson's experience was that most 17-year olds can give an informed consent. She stated: "I think the difficult time is in the 11, 12 and 13-year olds that we see. It is much more time consuming and difficult for them to understand what it means." (A. 92). She had had particularly difficult cases, such as parents of a 13-year old who opposed an abortion on religious grounds. (*Id.*) She agreed with Dr. Hodgson that "one can find a 13-year old who is better able to make a desion than a 17-year old." (A. 176).

Asked whether parents are most suited to provide emotional support to a pregnant teenage daughter, Dr. Nadelson replied: "Some are and some are not." (A. 177). She explained that parents "may at times be the worst people that one could talk to because they are so upset." (A. 178).

Finally, it was also Dr. Nadelson's experience that she had encountered no one in the 12 to 17 year old group who could not give an informed consent. (A. 186). She knew of only one instance. In that case the patient was mentally retarded. (*Id.*).

In sum, the expert testimony strongly supported Appellees and the judgment of the three-judge court.

Medical and psychiatric data and literature are fully in accord with the above, as are the policy recommendations of major national organizations and the decisions of numerous other lower courts.

The 1975 study by the Alan Guttmacher Institute[8] concluded:

> "Of approximately 430,000 women under age 20 who were estimated to be in need of abortion services, only 244,000 are estimated to have obtained them, and 186,000 apparently were unable to secure legal abortions. In 1973, there were 215,800 out-of-wedlock births to women under age 20."

A very significant segment of the population, therefore, is affected by curbs on access to abortion for minors. The study by the National Academy of Sciences indicated that in 1973 some 30.2% of all abortions were performed on young women between ages 15-19.[9] Only 1.5% of all patients were under age 15.[10]

Continuance of unwanted teenage pregnancy has numerous adverse personal and social consequences, not the least of which is the "continuing stigma of unwed motherhood. . . ." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

There is a higher suicide rate among pregnant young women under age 18.[11] A young woman unable to inform her parents finds herself in the pre-*Roe* v. *Wade* era

[8] Provisional Estimates of Abortion Need & Services In the Year Following the 1973 Supreme Court Decisions 9 (1975). Similar earlier figures led to the *Statement on Teenage Pregnancy* by the American College of Obstetricians and Gynecologists.

[9] Legalized Abortion and the Public Health 33, Fig. 6 (1975).

[10] *Id.* Undue focus on the problem of pregnant 14-year olds would distort the real statistical picture. Such instances are rare and are handled with great care by physicians, psychiatrists, and counselors as shown in the quoted expert testimony.

[11] Gabrielson, *et al.*, *Suicide Attempts In a Population Pregnant As Teen-agers*, 60 AM. J. PUB. HEALTH, 2289, 2297-98 (1970).

and may attempt to abort herself or seek out an underground non-medical abortionist at great risk to her life or health. (Testimony of Dr. Hodgson, A. 76).

If a teenager continues pregnancy both she and the eventual baby face greatly increased medical risks, as previously indicated.[12] This, and other aspects of the "problem of adolescent pregnancy" have been sufficient to invoke United Nations activity through the World Health Organization. *See* PREGNANCY AND ABORTION IN ADOLESCENCE, Tech. Rep. Series 583 (WHO, Geneva 1975).

It is against this background that the three-judge court made its determination.

C. Findings of the District Court:

First, the three-judge court upheld the class action nature of this litigation, holding:

> "We find that Mary Moe, Parents Air Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. . . . [T]hey have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all." 393 F. Supp. at 852.

As to medical facts the District Court found that an abortion in the first trimester does not impose "any greater risks for minors than for adults." 393 F. Supp. at 853.

The District Court found that parental support is desirable in general but that "an appreciable number

[12] *See also* Legalized Abortion and the Public Health 41, 60-62 (1975); Russell, *Sexual Activity and its Consequences in the Teenager*, 1 CLINICS IN OBSTETRICS AND GYNECOLOGY 683 (1974); Hodgson, *Teenage Mothers*, MINNESOTA MEDICINE 49 (Jan. 1972).

[of parents] are not [supportive] for a variety of reasons." 393 F. Supp. at 853. Also, "parents may seek to control sexual behavior by threats that they do not mean, or would not carry out . . . but which nonetheless serve to destroy intercommunication." 393 F. Supp. at 853.

Significantly, the District Court held:

> "We *must find*, however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." 393 F. Supp. at 853 (Emphasis supplied).

The evidence on this point was overwhelming. It supports the view of Appellees that a statute requiring consent of one parent, or consultation with a parent, or notice to a parent, would invade the patient's privacy as much as the one at issue here.

The three-judge court further found that:

> "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them. . . ." 393 F. Supp. at 853.

The District Court "accept[ed] the testimony of plaintiffs' experienced expert[s] that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson." 393 F. Supp. at 854.

Also, the court found as "fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." 393 F. Supp. at 854.

On the capacity of minors, the District Court held:

> "[A] substantial number of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.

The above findings, supplemented and supported by the evidence summarized above, warrant a judgment affirming the three-judge court.

ARGUMENT

I.

The Double Parental Consent Provision of the Massachusetts Abortion Law, Mass. Gen. Laws, c. 112, § 12P, Invades a Pregnant Minor Woman's Individual Fourteenth Amendment Right of Privacy by Permitting Either Parent, for any Reason or No Reason at all, to Veto Her Access to Necessary Medical Care, Regardless of Rape, Incest, Her Medical Needs, or Personal Maturity

A. THE STATUTE:

The Legislation in question expressly requires consent from *both* parents before an *unmarried* minor may obtain an abortion. Its language, for the convenience of the Court is set out as follows:

> MASS. GEN. LAWS, c. 112—
>
> Section 12P:
>
> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, con-

sent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian, or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent file."

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

Section 12Q:

"Any person who commits an act in violation of sections twelve L or twelve M shall be punished by a fine or not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who wilfully violates the provisions of sections twelve N or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars."

Section 12R:

"The attorney general or any person whose consent is required either pursuant to section twelve P or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of sections twelve I through twelve Q."

Section 12N:

"Except in an emergency requiring immediate action no abortion may be performed under sections twelve I or twelve J unless

(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery."

"Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services."

Massachusetts has more recently enacted a minor's consent for medical care bill which does not amend or alter the above.[13] That bill permits minors to consent

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[13] MASS. GEN LAWS, c. 112:

"Section 12F. No physician or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in

for any medical or dental care if already a parent, and/or if pregnant or possibly pregnant. However, abortion is expressly excluded from the new statute. In

treatment will endanger the life, limb, or mental well-being of the patient."

"Section 12H. (a) Any minor may give consent to his medical or dental care at the time such care is sought if

(i) he is married, widowed, divorced; or

(ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or

(iii) he is a member of any of the armed forces; or

(iv) she is pregnant or believes herself to be pregnant; or

(v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or

(vi) he reasonably believes himself to be suffering from or to have come in contact with any disease deemed to be dangerous to the public health as defined pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease."

"Consent may not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care."

"(b) No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if at the time such care was rendered, such persons or facilities:

(i) relied in good faith upon the representations of such minor to be legally able to consent to such treatment under paragraph (a); or

(ii) relied in good faith upon the representations of such minor to be over eighteen years of age."

"(c) All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with paragraph (a) shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending the minor reasonably believes the condition of said minor to be so serious that he is in danger of life or limb, he may notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

other words, a pregnant minor in Massachusetts may consent to any form of medical care except abortion.[14] This heightens the discrimination and totally undermines the rationale advanced by the Commonwealth and the Intervenors.[15] A 12-year old may now consent to a Cesarean section but not an abortion. It may be that a minor under the new law could obtain contraceptives if possibly pregnant but not an abortion when the contraceptive fails.

B. Decision of the District Court

After reviewing the evidence and making findings, the three-judge court turned to prior decisions from this Court.

The majority opinion by Senior Circuit Judge Aldrich noted that *Roe* v. *Wade*, 410 U.S. 113, 165 n.67

[14] Sterilization is also excepted by Mass. Gen. Laws c. 112, § 12H.

[15] Other "age lines" drawn in Massachusetts law cast no particular light on this case, although "it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to [abortion] until she is two years older." 393 F. Supp. at 855.

Males at age 14 and females at age 12 may marry. Mass. Gen. Laws c. 207 § 9. This hardly shows maturity, but it permits the giving of a legal consent, that is not void. Normally consent of one parent is required before age 18. *Id.* § 7.

Any minor above age 12 must consent to his/her own adoption. A minor parent of any age may consent to adoption of his/her child. Mass. Gen Laws c. 210, § 2.

Minors between ages 14 and 17 may be tried for criminal offenses as adults. Mass. Gen. Laws c. 119, § 61.

(1973), expressly left open the question of parental rights, if any. However, *Roe* "in no way suggested that a minor lacked personal rights." 393 F. Supp. at 856. Other cases such as *In re Gault*, 387 U.S. 1, 13 (1967), moreover, recognized that "neither the Fourteenth Amendment nor the Bill or Rights is for adults alone." 393 F. Supp at 856.

Ginsberg v. *New York*, 390 U.S. 629, 638 (1968), and *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944), were distinguished because "the [parental consent] statute is cast not in terms of protecting the minor . . . but in recognizing independent rights of parents." 393 F. Supp. at 856.

In discussing the extent to which parents may have rights in this context, Judge Aldrich stated:

> "[P]arents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity. . . ." 393 F. Supp. at 856

The District Court added:

> "And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. . . . The parents not only must be consulted, they are given a veto. Defendants do not like this word." 393 F. Supp. at 856.

No persuasive reasons were offered for this "right to be a grandparent." As the three-judge court stated:

> "It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it in all senses, financially and otherwise. It is difficult to think of any self

> interest that a parent would have that compares with those significant interests of the pregnant minor." 393 F. Supp. at 856.

The three-judge court opinion then returned to the subject of further precedent cited by Appellants. Judge Aldrich concluded:

> "[T]he cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance." 393 F. Supp. at 856.

Assuming *arguendo* that parents had "rights of a constitutional dimension vis-á-vis their child" the District Court "would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." 393 F. Supp. at 857.

Judgment was accordingly entered "permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion." 393 F. Supp. at 857.

C. Common Law and Statutory Sanction of Minors' Contracts for Necessities Including Medical Care

There is much myth in the legal literature and Appellants' briefs about the common law.[16] There is even language which shows reverence for the "non-person" status allegedly accorded to minors, women,

[16] It is apparently the position of both Appellants that the common law did not allow minors to contract for medical services. *Brief for the Appellants, pp.* 25-27; *Brief for the Intervenor,* pp. 15-16.

and slaves in those times. Appellees respectfully contend, however, that the common law has since the 1600's recognized a right in minors to contract for necessities, including medical care: that statutory law in Massachusetts and elsewhere recognizes the obligation of parents to provide medical care for their children, and that Appellees' position is in line with over 300 years of law, tradition, and reason.

The earliest common law decision found by Appellees is *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610), before the Court of King's Bench. Justice Williams viewed the case as one of first impression. ("There is no book case in this . . . ."). It was an action for money due against a minor who had promised to pay for being cured of "falling sickness" (epilepsy).[17] The minor pleaded non-age as a bar to the action. This plea was overruled, the court stating:

> "Clearly the action well lieth against the defendant, and the non-age . . . is not material, for that this to be taken as a contract . . . for a thing in the nature of necessity to be done for him, and the same as necessary as . . . meat, drink, or apparel . . . the reason of the law being the same, and this cure being of as great necessity for him, as any of the other . . ." *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610).

Eighty years later, in 1690, the Court of Kings Bench again held a minor patient liable for payment after medical care. In this case, *Huggins* v. *Wiseman,* Carth. 110, 90 Eng. Rep. 669 (K.B. 1690), an assumpsit action was brought for "labour and medicines in curing the defendant of a distemper . . . ." The plea of infancy

[17] COLUMBIA ENCYCLOPEDIA 664 (3rd ed. 1968).

was rejected because the contract "was for necessaries . . . ."

While *Dale, Huggins,* and like cases pertained to contracts, not alleged technical battery, there were no counterclaims asserting battery. It would be illogical to allow suit on a contract to perform a battery.[18]

Early Massachusetts cases follow this common law approach.

An 1886 decision, *Trainer* v. *Trumbull,* 141 Mass. 527, 6 N.E. 761 (1886), upheld a suit against a minor for " 'board, washing, doctor's bills, medicine, care, books,' etc." 141 Mass. at 527. The Massachusetts Supreme Judicial Court answered in the affirmative the question "whether the [matters] furnished to the defendant [minor] were necessaries for which he should be held responsible." 141 Mass. at 530. The Court stated that such items "fall clearly within the class of necessaries." 141 Mass. at 531.

The basic rule, stated in *Bradford* v. *French,* 110 Mass. 365, 366 (1872),[19] was and is:

> "The limits of the legal capacity of infants to act in their own behalf have been established by the law for their protection, *not to defeat the enforcement of their rights.* Contracts made and acts done by an infant, which are necessarily

[18] Copies of the *Dale* and *Huggins* decisions were provided to the District Court and opposing counsel during the trial below.

[19] The *Bradford* case itself upheld a replevin action by a minor in connection with a mortgage agreement he entered into. The Court also noted that a minor could give a valid bond and be liable for costs when a party in litigation. 110 Mass. at 367.

beneficial to him [her] are valid." (Emphasis supplied).

Other Massachusetts decisions are in accord. [20]

A corollary to the right of minors to contract for necessaries is the obligation of parents to provide the same. There have, indeed, been many criminal prosecutions of parents for failure to provide medical care. *See, e.g., R.* v. *Downs,* [1875] 1 Q.B. 25; *R.* v. *Senior,* [1899] 1 Q.B. 283; *Oakey* v. *Jackson,* [1914] 1 K.B. 216.

Cases relied upon by Appellants for their view of the common law all recognize that minors may and must give an informed consent, independent of the parents, for medical care, and such care must be beneficial.

Reddington v. *Clayman,* 334 Mass. 244, 134 N.E.2d 920, 922 (1956), involved a tonsillectomy & adenoidectomy in which the surgeon additionally removed the minor's uvulva (palate). Both parents and minor were held to have an action for exceeding the scope of authorized consent. 134 N.E.2d at 922. There was no suggestion that the surgeon could have operated without the minor patient's independent consent, nor that

[20] *E.g.,* Stone v. Dennison, 30 Mass. (13 Pick.) 1, 6 (1832) (a 14-year-old may validly agree to labor in exchange for necessaries); Swift v. Bennett, 64 Mass. (10 Cush.) 436, 438 (1852) (minor liable to third party who advanced sums to provide whaling gear); Dellamano v. Francis, 308 Mass. 502, 33 N.E.2d 327 (1941) (minor may sue hairdresser for breach of contract where hair burned); Wiley v. Fuller, 310 Mass. 597, 39 N.E.2d 418 (1942) ("[M]edical services furnished to a minor upon his [/her] own credit may be a necessary . . . ").

See also Sikes v. Johnson, 16 Mass. 389 (1820) (a minor may be responsible for civil trespass); Dow v. Lipsitz, 283 Mass. 132, 185 N.E. 921 (1933) (a minor may be guilty of gross negligence).

the parents might have been permitted to veto the minor's consent to the operation. *Reddington* simply does not speak to the issues in this case.

Similarly, *Bonner* v. *Moran,* 126 F.2d 121 (D.C. Cir. 1941), involved a skin graft taken from a 15 year old for the benefit not of himself but of another. The *Bonner* court recognized that that "where the child is close to maturity" the surgeon may be justified [but] "the basic consideration is whether the proposed operation is for the benefit of the child. . . ." 126 F.2d at 123.

While abortion is not necessarily the best solution to every unwanted teenage pregnancy, the testimony showed that in a great many instances both physician and patient will agree the procedure should be done.

Appellants also cite *Canterbury* v. *Spence,* 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972), as an "action based upon failure of surgeon to secure informed consent of minor's mother." *Brief of Appellants,* p.26. A review of the very lengthy opinion shows that it was a straightforward informed consent case. It was brought by a 19-year-old patient, who along with his mother signed consents, but alleged insufficient disclosure of risk. No contention regarding minority was made. The mother was not even a party to the litigation.

Similarly, Appellants cite *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal Rptr. 1 (1971), as a traditional parental consent case. To the contrary, *Ballard* was the landmark California case which held, on statutory grounds, "that minors may obtain therapeutic abortions under law without the necessity of parental consent." 4 Cal. 3d at 878, 95 Cal. Rptr at 4

Pertinent to this case *Ballard* observed:

> "[A]n unmarried pregnant minor understandably might be reluctant to seek parental consent. . . . [T]he parents of such a minor might refuse consent for reasons unrelated to the health of the minor." 4 Cal. 3d at 880, 95 Cal. Rptr. at 6.

Further, the *Ballard* court held:

> "There is no rational basis for discriminatorily singling out therapeutic abortion as the only type of pregnancy-related surgical care which requires parental consent." 4 Cal. 3d at 883, 95 Cal. Rptr. at 8.[22]

The Supreme Court of California took the same position urged by Appellees: "[T]he minor must be of sufficient maturity to give an *informed consent* to any treatment procedure." 4 Cal. 3d at 883, 95 Cal. Rptr. at 8 (Emphasis in original).

The *age* of consent is another matter in which common law history is instructive. All experts testified that there was no magic in the 18th birthday.

Historical scholars have pointed out that "[t]he reason why twenty-one was selected as the crucial age for majority appeared to depend upon the ancient rules of tenure." James, *The Age of Majority,* 4 AM. J. LEGAL HISTORY 22, 23 (1960). Previously, "Gothic kings seem frequently to have come of age at fifteen, for example Childebert II in 585 A.D." *Id.* at 22.

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[21] CALIF. CIVIL CODE § 34.5.

[22] By the same reasoning, the new Massachusetts statute on consent, MASS. GEN. LAWS c. 112, § 12H(4), note 13, *supra,* allows a pregnant minor to consent to any form of medical care *except* abortion.

Borough customs in England showed "a tendency to vary the age of majority needed according to the particular act. . . ." *Id* at 23 It appears that "at one time between the ninth and tenth century, fifteen was . . . the age of majority in England. . . ." *Id* at 26. It was arguably raised to 21 "due to the increase in the weight of arms." *Id.*

In modern America the age is again being lowered, particularly as regards medical care. Increased public education of minors and modern findings in clinical psychology may be responsible, and are certainly more rational than the practices of feudal sovereigns.

The point of the above is clear. The common law and history reveal no compelling state interest in preventing minors from contracting for necessities, including medical care. To the contrary, whenever presented with the question in the context of state civil lawsuits, Massachusetts courts and others uphold the rights of minors to contract for necessary services and goods. The ruling of the District Court, accordingly, rests on a sound and settled base.

D. DECISIONS BY THIS COURT ON THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF MINORS

By its terms, the Fourteenth Amendment embraces the rights of minors as much as adults. The Amendment, for example, defines citizenship as being conferred upon those "born or naturalized" in the United States, not just adults.

Case law, also, repeatedly applies the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, and numerous clauses therein, to secure rights for minors.

The First Amendment guarantee against laws "respecting an establishment of religion" has been successfully invoked by school children to bar compulsory prayers. *See Engel* v. *Vitale,* 370 U.S. 421 (1962) Neither *Engel* nor the many other school-prayer and Bible-verse decisions suggest that the minor's right to be protected from government imposed religion could be waived or vetoed by a parent, and backed up by state criminal sanctions. Indeed, the presence of a minor with standing to sue was held absolutely indispensable to a similar prayer case in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952). *See also School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

First Amendment free speech rights have similarly been held available to minors and school children. *Tinker* v. *Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969. A majority of this Court held in *Tinker*:

> "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." 393 U.S. at 511.

In no way did the Court suggest that the First Amendment protected only those students whose parents shared their views.

As *Prince* v. *Massachusetts,* 321 U.S. 158, 170 (1944), aptly pointed out:

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children. . . ."

Decisions such as *Tinker* have a history going back more than fifty years, to the landmark decision of *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). *Meyer* struck down a state law which forbad the teaching of modern foreign languages in all states schools, public or private. Rights of "a child of ten years," 262 U.S. at 396, were at issue, encompassing the rights "of pupils to acquire knowledge," 262 U.S. at 401, which were aspects of "liberty" secured by the Fourteenth Amendment.

More recently, *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), touched the issues of religious freedom and possible state coercion of minors and their parents. Minors of the Amish faith, aged 14 and 15, were tangentially involved in *Yoder.* 206 U.S. at 207 n.1. Their parents were prosecuted for violating the Wisconsin state compulsory education law. This Court upheld "[parental] rights and the right of *their* children, to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries."[23] 406 U.S. at 215 (Emphasis added).

Evidence in *Yoder* showed that "compulsory high school attendance could . . . result in great psychological harm to Amish children." 406 U.S. at 212 Here, as in *Yoder,* Appellees "have introduced persuasive evidence undermining the arguments the State has advanced to support its claim in terms of the welfare of the child and society as a whole." 406 U.S. at 234.

Yoder, in effect, involved a state effort to impose "an additional one or two years of compulsory high school education [on] Amish children." 406 U.S. at 224.

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[23] Justice Stewart, in a concurring opinion stressed that a different issue would be presented if "the religious beliefs of the [minors] . . . differ[ed] in any way from those of their parents." 406 U.S. at 237; *see also* 406 U.S. at 241-246.

In the present case a pregnant minor is threatened with compulsory childbirth and parenthood.

Ginsberg v. *New York,* 390 U.S. 629 (1968), and *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), are the only cases in which this Court has not fully or substantially upheld First Amendment claims made on behalf of or by minors.

Ginsberg, the minors' obscenity case, is heavily relied on by both Appellants and Intervenors. The case in fact supports Appellees.

In the first place, *Ginsberg* reiterated the holding of *Roth* v. *United States,* 354 U.S. 476 (1957), that "[o]bscenity is not within the area of protected speech or press." 390 U.S. at 634. Here, however, Appellees assert the right of privacy recognized in *Roe* v. *Wade,* 410 U.S. 113 (1973), which has constitutional antecedents dating back to the 1891 decision in *Union Pac. R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891). The rights asserted by Appellees are fully within the area of constitutionally protected privacy. As the Court stated in *Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965): "We deal with a right of privacy older than the Bill of Rights. . . ."

In *Ginsburg* there was "no argument that the magazines are not 'harmful to minors. . .' " 390 U.S. at 635. Here the very opposite applies. No one seriously contends that abortions are harmful to minors.[24] Indeed, the denial of an abortion to a minor can be a disaster which lasts throughout her lifetime.

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[24] Appellees do not suggest however, that any person old enough to become pregnant may ipso facto consent to an abortion. Our position is not so broad. We do not make the mistake of overreaching as was done in *Ginsberg* v. *New York,* 390 U.S. 629, 636 (1968).

Subsequent cases distinguish *Ginsberg* and emphasize that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 213 (1975).

We may concede *arguendo* that "the power of the state to control the conduct of Children reaches beyond the scope of its authority over adults. . ." *Prince* v. *Massachusetts,* 321 U.S. 158, 170 (1944). It is one thing, however, to stop a nine year old from selling religious propaganda at night and quite another matter to force a pregnant sixteen year old to become a seventeen year old mother because her own mother wants a grandchild.

While the *Engel-Tinker-Meyer* line and related cases concentrated on substantive constitutional rights, *Brown* v. *Board of Education,* 347 U.S. 483 (1954), spawned a line of decisions barring discrimination against minors, not only in access to education, but also in numerous respects where neither race nor education was an issue. Indeed, fourteen years after *Brown,* the Court was to hold:

> "[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy* v. *Louisiana,* 391 U.S. 68, 70 (1968).

If illegitimate children, regardless of age, are "persons" under the Fourteenth Amendment, unmarried pregnant minors should have comparable constitutional status.

In virtually all spheres of litigation the minor person has received the protection and benefits of the Bill of

Rights. Nowhere has this been more consistently the case than with respect to the rights of minors accused of juvenile offenses.

In re Gault, 387 U.S. 1 (1967), was the fountainhead of juvenile rights in offender proceedings.[25] The case pointedly held:

> "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13.

Gault applied the procedural constitutional rights to notice, confrontation, cross-examination, and the privilege against self-incrimination to minors in juvenile proceedings. The Court has often reaffirmed *Gault,* recognizing the right to insist that proof be beyond a reasonable doubt, *In re Winship,* 397 U.S. 358 (1970), and protection from twice being placed in jeopardy. *Breed* v. *Jones,* 421 U.S. 519 (1975) (Burger, C.J.). Only *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971), points the other way, primarily because a right to jury trial was not deemed necessary to fundamental fairness.

Whatever may be said of *Gault* and its progeny, no one would suggest that both parents of a juvenile should have the right to control his defense and veto his exercise of any rights there recognized.

In sum, a substantial body of case law acknowledges the fact that the Bill of Rights is not marked "adults only." With respect to freedom of religion, free speech, freedom from invidious discrimination, and fundamental fairness in juvenile offender proceedings, a minor is protected by the Bill of Rights, and not excluded as a "non-person."

[25] For earlier cases extending constitutional rights in criminal trials to minors, see *Haley* v. *Ohio,* 332 U.S. 596 (1948), *Gallegos* v. *Colorado,* 370 U.S. 49 (1962) and *Kent* v. *United States,* 383 U.S. 541 (1966).

The cases and language of the Constitution support this approach to the protection of fundamental personal rights in general. Indeed, the reasons behind the Bill of Rights have very little to do with chronological age. Similarly, a young woman's need for medical care to terminate pregnancy is also wholly unrelated to age.

E. Application of *Roe* v. *Wade* and *Doe* v. *Bolton* to this Case:

Roe v. *Wade* and *Doe* v *Bolton* expressly declined to intimate any view on the constitutionality of state laws bestowing rights on the parents of a pregnant minor. 410 U.S. at 165, n.67. The issue is squarely presented here, however.

A fair reading of the language and reasoning of *Roe* and *Doe* adds plain support to Appellees. Appellants have certainly not suggested that *Roe* and *Doe* are supportive to them.

Following the *Roe* opinion, it is true that the age of majority in ancient times was often below 18 years. James, *supra.* At common law, moreover, minors were allowed to contract for necessities, including medical care, at least as early as *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610).

Appellants have not cited one common law case from the last 500 years holding a physician liable for even a technical battery in performing a reasonably necessary medical service for a minor who had a reasonable degree of understanding and maturity.

Roe regarded the A.L.I. position and Uniform Abortion Act as significant.

The MODEL PENAL CODE art. 207, § 207.11, on "abortion and related offenses" did not require parental consent for minors in any of its drafts. Age ten was set for statutory rape in MODEL PENAL CODE § 213.1(1)(d) (Proposed Official Draft 1962), and age 16 (with the man 4 years older) for corruption or seduction. *Id.*, § 213.3(1)(a).

The UNIFORM ABORTION ACT *expressly* dispenses with any requirement of parental consent. Section 3 of the Act states:

> "Consent to an abortion must first be given by the woman or, if she is mentally incapable of giving consent, by a parent or guardian or by order of the [appropriate] court. *A woman is not incapable by reason of her minority of giving consent to an abortion under this Act.*" *Revised Uniform Abor-Act* § 3, in 9 UNIF. LAWS 9 (Cum. Pk. Pt. 1975) (Emphasis supplied).

The Commissioner's Comment states:

> "It is important to note that age of the pregnant female is not a necessary determinant of incapacity. A pregnant female in her minority may consent to an abortion given that other factors of incompetency or incapacity are not present." *Id.*

Accordingly, Appellees' constitutional position and understanding of *Roe* v *Wade* are precisely in line with that of the Commissioners on Uniform State Laws.

This Court in *Roe* also discussed the medical hazards of "illegal 'abortion mills' " and the relative safety of legal abortion in the hands of experienced physicians. 410 U.S. at 149-150. Without the protection of *Roe*,

however, minors will be driven into the dangerous and exploitive conditions of past decades.

Another focus of *Roe* v. *Wade* was the disastrous impact upon a woman's life and society as a whole caused by unwanted pregnancy. As the Court stated:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153.

All or most of the factors above are aggravated in the case of adolescent pregnancy. The Record previously reviewed makes this clear.

Roe surveyed the lower court approaches to abortion generally and found: "the results are divided . . ." 410 U.S. at 155. With regard to parental consent, see *post*, the vote of the federal judiciary has been 30 to 4 for the position urged by Appellees. There is little division.

Finally, *Roe* concluded by stressing the need to allow leeway for physician and patient autonomy. The Court's summary held:

> "For the stage prior to approximately the end of the first trimester, the abortion decision and its

effectuation must be left to the medical judgment of the pregnant woman's attending physician." 410 U.S. at 164.

The opinion concluded with the admonition:

> "[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 410 U.S. at 166.

There are no narrowly drawn, compelling reasons for allowing state intervention into this process simply because of the chronological age of the patient. The right of privacy asserted by Appellees is the "right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird,* 405 U.S. at 453 (Emphasis in original). It is not the right of a parent to veto or control events which will affect a minor for a lifetime.

Finally, Appellees agree with the Chief Justice that:

> "the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to health." *Roe* v. *Wade,* 410 U.S. 113, 208 (1973) (concurring opinion).

Doe v. *Bolton,* 410 U.S. 179 (1973), further supports Appellees. *Doe* struck down several provisions of the Model Penal Code-type abortion law from Georgia.[26]

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[26] After *Doe* v. *Bolton,* the Georgia legislature rewrote its abortion law. *See* GA. CODE ANN. § 26-1201. No. requirement of parental or spouse consent was included.

Doe reiterated the need to allow leeway for private action within the physician-patient relationship:

> "[T]he medical judgment may be exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

It is the physician's responsibility to consider the family situation and patient's age. When a patient strongly feels that parental involvement would be destructive, it is within the physician's role to agree. There is no duty on his part to conduct a private investigation or lengthy cross-examination of the patient. Experienced physicians in this field can and do make such judgments many times each day.[27]

Doe v. *Bolton* struck down requirements of third party consent by multiple physicians and a hospital committee. These were viewed as "basically redundant." 410 U.S. at 197. Here as in *Doe,* with third party vetoes,

> "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited . . . ." 410 U.S. at 197

A similar analysis to that in *Doe* shows the impropriety of requiring parental consent for an abortion.

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[27] As *Doe* states: "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. . . . Required acquiescence by co-practitioners has no rational connection with a patients' needs and unduly infringes on the physician's right to practice." 410 U.S. at 199.

F. Lower Court Decisions on Parental Consent, Abortion, and Contraception:

The decision of the District Court exhaustively examined all opposing contentions in concluding that the double parental consent clause of the Massachusetts abortion law was unconstitutional. With the exception of the *Danforth*[28] case, the lower courts have unanimously invalidated parental consent to abortion statutes or regulations. *See, e.g., Poe* v. *Gerstein,* 517 F.2d 787, 789-794 (5th Cir. 1975); *Word* v. *Poelker,* 495 F.2d 1349, 1354 (8th Cir. 1974); *Jackson* v. *Guste,* — F. Supp. —, Civ. No. 74-2425, Sec. F (E. D. La., January 26, 1976) (three-judge court); *Doe* v. *Exon,* — F. Supp. —, Civ. No. CV 75-L-146 (D. Neb., October 8, 1975) (three-judge court); *Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 566-567 (E. D. Pa. 1975) (three-judge court); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *Gary-Northwest Indiana Women's Services* v. *Bowen,* — F. Supp. —, Civ. No. H-74-289 (N.D. Ind., January 3, 1975) (three-judge court); *Wolfe* v. *Schroering,* 388 F. Supp. 631, 636-637 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah, 1973) (three-judge court); *State* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 260 (1975); *cf. Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

Among the lower court federal judges, the well-reasoned opinions are numerous. The vote has been 30 to 4. On few issues has the Federal judiciary spoken with such unity, clarity, and persuasiveness.

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[28] Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted pending appeal,* 420 U.S. 918, *prob. juris, noted,* —— U.S. —— (1975) (Nos. 74-1151 & 74-1419).

The two judges in *Planned Parenthood* v. *Danforth,* 392 F. Supp. 1362 (E.D. Mo. 197[illegible], relied heavily on *Prince* v. *Massachusetts, supra, Ginsberg* v. *New York, supra,* and *Wisconsin* v. *Yoder, supra.* As Appellees have already shown, those cases in fact should be read to favor our position. They all recognize that minors have independent constitutional rights. They all rule on the side of protecting minors. They all involve a unity of interest between minor and parent, which is absent here. Not a word in *Prince, Ginsberg,* or *Yoder,* suggests that parents should have control over the fundamental privacy rights of minors.

Significantly, the *Danforth* majority refused to discuss any of the substantial contrary authority.

II. The Asserted State Justifications are Not Narrowly Drawn to Advance Legitimate, Compelling Interest

As Justice White suggested while concurring in *Wisconsin* v. *Yoder,* 406 U.S. 205, 237 (1972), this case involves "a delicate balancing of important but conflicting interests."

The decision in *Roe* v. *Wade,* 410 U.S. 113, 155 (1973), repeated the established principles which govern this appeal:

> "Where certain 'fundamental rights' are involved . . . [legislation] limiting these rights may be justified only by a 'compelling state interest' . . . [citations omitted]

Not only must the asserted state interest be legitimate and compelling, but such legislation must not be overbroad:

> "[E]nactments must be narrowly drawn to express only the legitimate state interests at stake."

The *Roe* test is one of due process. Related and overlapping equal protection issues are presented here too.[29] *See Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). Similarly, the parental consent statute constitutes a legislative decree that no person under age 18 is competent to consent to an abortion. This contravenes the line of decisions which have struck down certain irrebutable presumptions as violative of due process. *See Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

The State interests relied on by Appellants and Intervenors overlap, and are very general in terms. Some are more properly characterized as interpretations of judicial doctrines or legal concepts which have already been discussed. Appelee's analysis of possible state interests is as follows:

Non Legitimate Interests—It is clear that those state interests restrained or limited in *Roe* v. *Wade* and *Doe* v. *Bolton,* such as protection of maternal health, any interest in fetal life and redundant multiple physician involvement are no more legitimately asserted on a parent's behalf than for the State. This was the rationale of *Coe* v. *Gerstein,* 376 F. Supp. 695 (S.D. Fla. 1973) (per curiam) (three-judge court), the first federal decision on this point.[30] That court stated:

[29] The *Verified Complaint* asks for a "declaratory judgment that the parental consent requirement violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. . . ." (A. 16).

[30] An appeal to this Court by the State was dismissed. 417 U.S. 279. Subsequently the Fifth Circuit affirmed on the merits in an exhaustively documented opinion. 517 F.2d 787 (5th Cir.), *appeal docketed,* 44 U.S.L.W. 3319 (U.S. Nov. 14, 1975) (No. 75-713).

> "We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or parents to protect their interests in that potential life until the fetus becomes viable." 376 F. Supp. at 697.

This was the case with an asserted parental interest in a minor's health:

> "We are persuaded, also, that if the State cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or parents to protect their interests in her health until that point is reached." 376 F. Supp. at 697.

Finally, the three-judge court concluded:

> "The failure of the Florida 'spousal or parental consent' requirement is that it gives to husbands and parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a husband or parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so . . . . [T]he State may not statutorily delegate to husbands and parents an authority the State does not possess." 376 F. Supp. at 698.

There is nothing in the Massachusetts abortion law to prevent a parent from taking into account his or her personal views on abortion, contrary to *Roe,* as a basis for withholding consent. Indeed, the State and Intervenor both openly assert a right to become involved in the medical and phychological evaluation of first tri-

mester abortion patients.[31] *Roe* forbids this. It has not been shown to be necessary. The physician and patient are the proper persons to determine in a given case whether parental involvement would be supportive or destructive, not the State. The details of group versus individual counseling, local versus general anesthesia, and Freudian versus Skinnerian psychology are not proper matters to resolve in first trimester abortion litigation. As with adults, the physician-patient relationship should be regulated as *Roe* and *Doe* suggested—by professional review and malpractice standards, not by the heavy hand of parental veto backed by the criminal law.

Family Unit—Appellees agree in principle that preservation of harmony in the family unit is legitimate, indeed a salutary government goal. However, the parental consent statute does not work that way in a substantial class of cases. A requirement of compulsory parental involvement or consent may be destructive to both parent and child. The statute is overbroad in omitting recognition of this fact.

Appellees have already set out the evidence, findings, and reasoning of the District Court on the family unit issue.

It would not preserve the family to have "kick[ed] [Mary Moe] out of the house. . . ." (Tr. 135). The "subclass of teenagers" (A. 357) discussed by defendants' expert Dr. Yerkes already live outside of traditional family units.

To subject a teenager, over her strenuous objection, to the physical and mental health hazards of an ado-

[31] *Brief for the Appellants,* pp. 14-15, 17-18, 28, 39, 43-45; *Brief for the Intervenors,* pp. 8, 10, 16, 20-23.

lescent term pregnancy discussed by Dr. Hodgson (A. 75) would hardly strengthen the family unit. There are some parents who would force an abortion on a minor,[32] and forced pregnancy must be considered a comparable evil.

As the Fifth Circuit stated in *Poe* v. *Gerstein,* 517 F. 2d. 787, 794 (5th Cir. 1975),

> "in the abortion context the requirement of parental permission is unlikely to achieve the state's aim of insuring the preservation of the family. If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit."

To permit the minor's abortion, moreover, supports her later formation of a more stable family unit in the next generation. At that time she may voluntarily desire to form such ties and/or become a *willing* parent.

Parental Control—Appellees, as the Fifth Circuit, "have some difficulty accepting parental control as a compelling state interest in the context of this statute." *Poe* v. *Gerstein,* 517 F.2d 787, 793 (5th Cir. 1975). In the case of a pregnant minor, to some degree "whatever control the parent once had over the minor has diminished if not evaporated entirely." 517 F.2d at 794.

Parental control has connotations of authoritarianism which are alien to our system and institutions. Such control *per se* implies a right in the parents to

[32] *In re Smith,* 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), is the report of an emergency appellate court session to prevent a sheriff from taking a young woman to a hospital for a forced abortion insisted upon by her mother.

force an abortion, as was attempted *In re Smith, supra.*

The expert testimony, again, strongly suggests that parental control can be badly abused in a substantial class of cases.

Finally, under the new minor's consent law, MASS. GEN. LAWS c. 112, § 12H(4), a pregnant minor can obtain any form of medical treatment without parental consent except abortion. With this the case, she is penalized and forced to notify her parents only if abortion is her chosen course of action. No uniform rationale of parental control can support such invidious discrimination.

Protection of the Minor—Appellants appear to seriously assert that the double parental consent requirement is designed to protect the best interests and privacy rights of minors who might otherwise be improvident. This protection is not necessary in the case of a minor who may give an understanding and informed consent. As the District Court found,

> "a substantial number of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.

Nothing in the statute, legislative history, or the nature of parental consent would necessarily improve the quality of such a minor's understanding. The statute has no exception for mature minors, or other minors with immature, emotionally upset parents. As the Fifth Circuit stated,

> "the ability of the parent to improve the 'quality' of the abortion decision is questionable, for the ameliorative qualities of a third person's wisdom and experience in this decision are uncertain." 517 F.2d at 793.

Further, that court observed, "numerous cases have noted parents refusing operations on their children for nonsensical or even punitive reasons." 517 F.2d at 793.

* * *

In sum, of the many possible interests asserted by Appellants and Intervenors, none is necessary to the achievement of any narrowly drawn compelling governmental interest.[33]

III. The District Court Correctly Refused to Seek a State Court Ruling on the Meaning of Sec. 12 P

The abstention or "*Pullman* doctrine" recognizes the principle ". . . that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts

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[33] The legal commentary on this issue has been strongly supportive of Appellees' position. *See* Zuckerman, *Abortion and Contraception: A Minor's Constitutional Right to Privacy*, 4 FAM. PLANNING/POPULATION REP. 114 (Dec. 1975); Lee & Paxman, *Pregnancy and Abortion in Adolescence: A Comparative Legal Survey and Proposals for Reform*, 6 COLUM. HUMAN RIGHTS L. REV. 307 (1974-1975); Paul, *Legal Rights of Minors to Sex-Related Medical Care*, 6 COLUM. HUMAN RIGHTS L. REV. 357 (1974-1975); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE. W.RES. L. REV. 779 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974); Note, *Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (Feb. 1974); Note, *Right of Husband or a Minor's Parent to Participate in the Abortion Decision*, 28 U. MIAMI L. REV. 251 (Fall 1973). Comment, 9 AKR. L. REV. 158 (Summer 1975); Comment, 9 SUFF. U.L. REV. 841 (Spr. 1975).

have been afforded a reasonable opportunity to pass upon them." *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959); *see Railroad Com.* v. *Pullman Co.*, 312 U.S. 496 (1941); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Harman* v. *Forssenius*, 380 U.S. 528 (1965). This doctrine, however, ". . . is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964); *see Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974). Indeed, abstention requiring the postponement of a decision upon the constitutionality of a state statute is proper only under ". . . . special circumstances (citations omitted) justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' (citations omitted)." *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 509 (1972).

Such "special circumstances" exist "[i]f the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim . . . (citations omitted)." *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 84 (1975). In such a situation, abstention preserves comity and avoids premature constitutional adjudication. *See Harman* v. *Forssenius, supra; Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). "Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constituional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and

protect every right granted or secured by the Constitution of the United States.' (citation omitted)." *Kusper* v. *Pontikes*, 414 U.S. 51, 55 (1973); *see Wisconsin* v. *Constantineau, supra; Fornais* v. *Fidge Tool Co.*, 400 U.S. 41 (1970); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

Whatever construction the Massachusetts courts place upon Sec 12P, it would still be violative of the privacy rights of the class of females represented by Mary Moe. By its terms, the statute gives to parents of minors an unbridled veto, subject to the approval of a judge of the Superior Court, over their daughter's constitutionally protected decision "to bear or beget a child." *Eisenstadt* v. *Baird, supra* at 453. Once one of the parents disapproves for any reason at all, the young woman has the burden of proving to the judge that "good cause" exists for the performance of the abortion. The statute provides no standards to guide her or the judge in his difficult task. He must choose between the privacy rights of the young woman and the rights of the parents as established by the statute.

Even if "good cause" in Sec. 12P were construed to mean "reasons adequate to persuade a judge, on the basis of traditional equity notions, to authorize the surgery, *Brief for the Appellants*, p. 39, this would not negate the deference the judge must pay to the views of her parents. The hearing would still be a major obstacle to overcome in the assertion of her fundamental rights. It would also provide some delay in her decision making process, thereby increasing the medical risks of terminating her pregnancy. *Roe* v. *Wade, supra* at 150.

The nature of the "good cause" for an abortion was determined by *Roe* v. *Wade* and *Doe* v. *Bolton* to be a

matter between physician and patient, not to be litigated endlessly.

Adoption of Appellant's view would generate another mass of litigation under 42 U.S.C. § 1983 in the federal courts and MASS GEN. LAWS, c. 112, § 12P(1), in state courts, with minors set against their parents in judicial contests over the scope of federal privacy rights and interpretation of the fluid term "good cause." A few calculations would quickly show that hundreds of such lawsuits would be filed annually in Massachusetts alone: perhaps thousands nationally if similar legislation were to be adopted.

IV. The District Court, in Its Discretion, Correctly Determined that a Guardian Ad Litem was Unnecessary to Protect the Interests of Mary Moe

Appellants and Intervenors have raised two procedural issues: (1) whether a guardian *ad litem* was necessary for Mary Moe, and (2) whether the parents of Mary Moe should have been joined as necessary parties.

For three reasons it is unnecessary to resolve either issue.

First, Mary Moe was not an indispensable party to the litigation. The District Court correctly found that Dr. Zupnick and Parents Aid Society, Inc., had full standing to sue. This rendered the standing and representation of other parties essentially academic.

Second, the statute was challenged on its face, not as applied to Mary Moe. The facts pertaining to her had necessary bearing solely on the standing and class action questions. With others in the case, the District Court could reach the merits.

Third, in view of the result on the merits, which recognized her constitutional rights, the presence or absence of a guardian became immaterial. Her rights were vindicated when she obtained the abortion. There was nothing more a guardian *ad litem* could do for her.

However, since the issue was not excluded in the grant of jurisdiction, and has been briefed, Appellees will respond.

Whether or not a federal court should appoint a guardian *ad litem* to protect the interests of a minor is a sensitive decision necessarily involving a variety of factors arising from the child's relationship with the world of adults. This fact is recognized in FED. R. CIV. P. 17(c) [34] which gives the court broad discretion in deciding the matter. *Jacobs* v. *Board of School Commissioners,* 490 F.2d 601, 604 (7th Cir. 1973), *vacated on other grounds,* 420 U.S. 128 (1975); *Travelers Indemnity Co.* v. *Bengtston,* 231 F.2d 263, 266 (5th Cir. 1956); *Westcott* v. *United States Fidelity and Guaranty Co.,* 158 F.2d 20 (4th Cir. 1946); *Foe* v. *Vanderhoof, supra,* 389 F. Supp. at 957.

> "Rule 17(c) does not make the appointment of a guardian ad litem mandatory. If the court feels that the infant's interests are otherwise adequately represented and protected a guardian ad litem need not be appointed. (Citation omitted)." *Roberts* v. *Ohio Casualty Insurance Co.,* 256 F.2d 35, 39 (5th Cir. 1958); *see* 6 WRIGHT & MILLER,

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[34] The Rule states in part:

"The Court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. Fed. R. Civ. P. 17(c)."

FEDERAL PRACTICE AND PROCEDURE, § 1570 at 775 (1971).

Most courts have taken a practical approach in deciding this question. *Cf. In re Adoption of a Minor,* 120 F.2d 720 (D.C. Cir. 1941); *Till* v. *Hartford Accident and Indemnity Co.,* 124 F.2d 405 (10th Cir. 1941); *Rutland* v. *Sikes,* 203 F. Supp. 277 (E.D.S.C.), *aff'd on other grounds,* 311 F.2d 538 (4th Cir. 1962), *cert. denied,* 374 U.S. 830 (1963); *Foe* v. *Vanderhoof, supra.* Where the minor's interests have been or would be adequately protected by an able and experienced attorney,[35] other parties in the suit,[36] or the court itself,[37] the appointment of a guardian *ad litem* has been deemed unnecessary. Other factors which have mitigated against the appointment of a guardian *ad litem* have included the intelligence, understanding, and maturity of the child,[38] the cost of such appointment,[39] and the existence of constitutional rather than monetary issues in the case.[40]

Significantly, Mary Moe had sought out and recieved the supportive guidance of experienced counselors at the Parents Aid Society. As a result, she understood the nature both or her pregnancy and of the lawsuit she had initiated. Her attorney, having previously participated in challenges to parental consent laws in other

[35] *Jacobs* v. *Board of School Commissioners, supra; in re Adoption of a Minor, supra; Foe* v. *Vanderhoof, supra; Rutland* v. *Sikes, supra.*

[36] *in re Adoption of a Minor, supra.*

[37] *Id.; Foe* v. *Vanderhoof, supra.*

[38] *Foe* v. *Vanderhoof, supra.*

[39] *United States* v. *Noble,* 269 F. Supp. 814 (E.D.N.Y. 1967).

[40] *Jacobs* v. *Board of School Commissioners, supra; Rotzenburg* v. *Neenah Joint School District,* 62 F. R.D. 340 (E.D.Wis. 1974).

jurisdictions, was sensitive to the inherent medical and psychological issues of the case. Although he also represented other plaintiffs who arguably stood to indirectly gain financially from a successful outcome,[41] there is no indication whatsoever that Mary Moe's interests in the case were at all compromised. In point of fact, the interests of all plaintiffs in challenging the statute were coexistensive throughout the trial. Furthermore, "... to the extent that there may be thought to [have been] any conflicting interests, [Mary Moe was protected] by the action of competent counsel for the intervening parent." 393 F. Supp. at 850 n.5. The District Court's findings, made after an extensive *in camera* interview with Mary Moe, are reflective of these facts.

The District Court also noted the irony of Appellants' position on this issue. As opposed to the guidance and support given to Mary Moe in the present case, "... the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance *no one at all may be representing her.*" 393 F. Supp. 850 n.5. (Emphasis added).

Appellants have cited the cases of *Roberts* v. *Ohio Casualty Insurance Co., supra* at 39, and *Noe* v. *True,* 507 F.2d 9, 11-12 (6th Cir. 1974), as being supportive

[41] Respondent Parents Aid Society is a non-profit organization (393 F. Supp. at 851, A-10). Consequently, it did not care to benefit financially from a favorable decision. Moreover, the fact that Mr. Baird had never drawn a salary for his work at Parents Aid Society (393 F. Supp. at 851, A. 259) and that Dr. Zupnick frequently performs abortions for free (A. 220, 222) is indicative of their lack of monetary motivation in pursuing this action.

of their claim. Yet the lower court in neither case considered or ruled upon the appointment of a guardian *ad litem*. In contrast, the District Court below made a reasoned ruling based upon its perception of the pertinent factors. At a minimum, their determination was not an abuse of discretion.

V. Joinder of the Parents of Mary Moe as Defendants was Unnecessary

A. The District Court Correctly Refused to Join the Parents of Mary Moe as Defendants Because Neither Had a Cognizable, Independent Interest in the Case:

Fed. R. Civ. P. 19(a) provides in part:

> "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . . (2) he claims an interest relating to the subject of the action and is so situated that the deposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest. . . ."

Appellees concede that the parents of Mary Moe, as citizens of Massachusetts, would have been subject to service of process in this action. Moreover, their joinder would not have deprived the court of subject matter jurisdiction. They submit, however, that neither parent possessed a cognizable, personal interest, independent of their daughter, in the subject matter of the case which would have been prejudiced by the case's disposition in his or her absence. See, section I, *supra;* 393 F. Supp. at 856-857. Consequently, their

joinder was "unnecessary." *See, e.g., International Union of Operating Engineers, Local 103, AFL-CIO* v. *Imscher & Sons, Inc.,* 63 F.R.D. 394, 398 (N.D. Ind. 1973).

B. Mary Moe's Parents Were Adequately Represented in This Class Suit by Intervenor-Appellant:

This case was brought and certified as a class action. 393 F. Supp. at 849-850. Appellees sought a judgment declaring Sec. 12P unconstitutional and an injunction prohibiting its enforcement and implementation. (A. 14, 15). It was, therefore, a class action maintained under Fed. R. Civ. P. 23 (b)(2). In such actions, notice to the absent members of the class is not required. *Childs* v. *United States Board of Parole,* 511 F.2d 1270, 1276 (D.C. Cir. 1974); *Watson* v. *Branch County Bank,* 380 F. Supp. 945, 959-960 (W.D. Mich. 1974).

By definition, a class action is brought to allow the court to adjudicate the rights of a class of persons whose joinder in the action is impractical. Fed. R. Civ. P. 23(a); *see Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921). Fed. R. Civ. P. 19(d) [42] recognizes the superiority of the class action to the joinder procedure when there are numerous "interested" parties. *See, e.g.,* 3A Moore, Federal Practice, ¶ 19.21, 2617-2618 (1974).

Since this action was applicable to a large number of Massachusetts residents, Mary Moe was allowed to

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[42] Fed. R. Civ. P. 19(d) provides:

"This rule is subject to the provisions of Rule 23."

represent "... a substantial class of unmarried minors in Massachuetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." 393 F. Supp. at 850. Likewise, Mrs. Hunerwadel, the mother of three teenaged daughters, was allowed to intervene and represent the "... parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them." 393 F. Supp. at 850.

Appellees submit that Mary Moe's parents fell precisely within the class of parents represented by Mrs. Hunerwadel. Even assuming *arguendo* that they possessed cognizable and independent rights in this matter, there is no basis to assume that their rights were distinguishable from those of their fellow class members. Nowhere has it been suggested that Mrs. Hunerwadel failed to adequately represent this class. Consequently, she also adequately represented the alleged rights of Mary Moe's parents.

Appellees feel obliged to point out two more facts in defense of the rationality of the District Court's decision. First, if the parents of Mary Moe should have been joined here, by the same logic the daughters of Mrs. Hunerwadel should also have been joined. Like Mary Moe, Mrs. Hunerwadel was allowed to testify at the trial. (A. 360-372). Yet the Appellees did not have the benefit of Mrs. Hunerwadel's daughters to impeach her testimony.

The Court wisely dismissed three other Mary Moes and the remaining Intervenor-parents from the case. 393 F. Supp. at 849, n. 1,850. Had this not been done, the logic of the Appellants would have required the joinder of dozens of superfluous parties.

The second point that must be brought out is the fact that Mary Moe would never have participated in the case had her parents been notified. As the District Court noted, her desire to conceal her pregnancy "... precisely fits standard concepts of the right of privacy." 393 F. Supp. at 853. By honoring Mary Moe's wishes and not informing or joining her parents in the case, the District Court acted with restraint and sensitivity.

CONCLUSION

For the reasons set out in this brief, the Court should affirm the judgment of the District Court and award costs to Appellees.

Respectfully submitted,

ROY LUCAS
LUCAS & STOLTZ
Suite 250
Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006
Tel: (202) 338-6955

Attorneys for Appellees.

Of Counsel:

JOAN C. SCHMIDT
Suite 200
One Center Plaza
Boston, Massachusetts 02108

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109